Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

**ENTRY ORDER**

**SUPREME COURT DOCKET NO. 2001-422**

**MAY TERM, 2002**

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| | } | APPEALED FROM: |
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| State of Vermont | } | District Court of Vermont, Unit No. 2, Chittenden Circuit |
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| v. | } | |
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| James A. Gaboriault | } | DOCKET NOS. 2514/2515-5-01 Cncr |
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| | } | Trial Judge: Michael S. Kupersmith |
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In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, based on a jury verdict, of two counts of second-degree aggravated domestic assault, in violation of 13 V.S.A. § 1044(a), and one count of violating conditions of release, contrary to 13 V.S.A. § 7559(e). Defendant contends the court: (1) erred in denying a motion for judgment of acquittal on the domestic assault charges because the evidence was insufficient to prove bodily injury; and (2) committed plain error in allowing the State to prosecute him on two counts of domestic assault stemming from the same incident. We affirm.

Viewed in the light most favorable to the judgment, State v. Griswold, 782 A.2d 1144, 1148 (2001), the facts may be summarized as follows. On the afternoon of May 6, 2001, defendant and Chantal Dashnow were in the parking area of the Colchester Pond when another couple, Todd Houston and Nicole Murphy, heard defendant shout and curse at Dashnow. Dashnow was carrying a young child, and Houston observed that both Dashnow and the child were crying. Houston described defendant as screaming at the top of his lungs. Houston told Murphy to call the police, and observed both defendant and Dashnow enter a car. He then saw defendant exit the vehicle and drag Dashnow out of the car. Houston recalled that defendant then picked up Dashnow and threw her onto the car with sufficient force to cause pain.

When an officer from the Colchester Police Department arrived at the scene and questioned Dashnow, she gave him a false name. Dashnow later testified that she lied to protect defendant because there was a court order restraining him from having contact with her. A second officer testified that Dashnow refused to allow him to view her back to determine whether she had any bruises or other injuries. Dashnow denied at trial that she was assaulted or injured by defendant.

Defendant was charged with two counts of second-degree aggravated domestic assault, one charging that the assault was in violation of a protective order, in violation of 13 V.S.A. § 1044(a)(1), and the second charging that the assault was a second offense of domestic assault, in violation of § 1044(a)(2). The jury returned verdicts of guilty on both counts, as well a third count charging a violation of conditions of release (VCR). At the State's election, the sentencing court dismissed the domestic assault count under 1044(a)(2), and sentenced defendant to three to five years plus a fine on the first domestic assault conviction under §1044(a)(1), as well as a consecutive term of zero to six months, all suspended, for the VCR conviction. This appeal followed.

Defendant first contends the court erred in denying a motion for judgment of acquittal on the domestic assault charges based on insufficient evidence to establish the element of bodily injury. In reviewing a denial of a motion for judgment of acquittal, we view the evidence in the light most favorable to the judgment and, excluding any modifying evidence, determine whether that evidence was sufficient to support a finding of guilty beyond a reasonable doubt. Griswold, 782 A.2d at 1148. As noted, an eyewitness testified that defendant picked up the victim and forcefully threw her onto a car.

He also stated that the force of the assault was sufficient, in his view, to cause pain to the victim. Bodily injury is defined for purposes of domestic assault as meaning "physical pain, illness or any impairment of physical condition." 13 V.S.A. § 1021(1). Although the victim here denied that she suffered bodily injury, the jury could reasonably rely on the circumstances and force of the assault to infer that the victim suffered physical pain. See, e.g., Goodin v. State, 750 S.W.2d 857, 858-59 (Tex. App. 1988) (finding of pain as element of offense may be inferred from objective evidence of physical injury). Accordingly, the motion was properly denied.

Relying on State v. Ritter, 167 Vt. 632 (1998) (mem.), defendant also contends that the court committed plain error in allowing the State to prosecute defendant on two counts of second-degree aggravated domestic assault under 13 V.S.A. § 1044(a)(1) (domestic assault in violation of protective order) and (a)(2) (second or subsequent offense of domestic assault). Ritter held that the Legislature could not have intended to authorize separate punishments for convictions of the two sections stemming from one incident. Id. at 633-34. Consistent with Ritter, the court here sentenced defendant on only one of the two domestic assault convictions and vacated the other. Defendant contends, however, that his due process rights were violated by being charged with both offenses because it allowed in prior bad acts evidence. The contention was not raised below; therefore, we review the claim solely to determine whether any error resulted in a miscarriage of justice. State v. Mears, 170 Vt. 336, 341 (2000). The record here does not show that the jury was apprised of defendant's prior domestic assault conviction, and defendant raised no objection to the investigating officer's limited testimony concerning the existence of a prior protective order prohibiting defendant's contact with Dashnow. Indeed, the defense admitted that defendant had violated a court order prohibiting contact with Dashnow, and Dashnow acknowledged as much in her testimony. Furthermore, the court instructed the jury that they were not to be concerned with the nature of the offense that led to the protective order. Accordingly, we discern no violation of due process or miscarriage of justice.

Affirmed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice